UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,
v.
ASCENCION ALVEREZ-TEJADA,
Defendant.

NO. CR-05-126-RHW-11

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

Before the Court are Defendant's Motion to Dismiss Case or to Suppress (Ct. Rec. 616); Defendant's Motion to Dismiss (Ct. Rec. 696); and Defendant's Motion to Suppress Evidence (Ct. Rec. 699). Hearings on the motions were held on March 8 and 13, 2006. Defendant was present and represented by James Egan. The Government was represented by Assistant United States Attorney Russell Smoot.

Defendant is charged with Conspiracy to Distribute 5 Kilograms or More of a Mixture or Substance Containing a Detectable Amount of Cocaine and 500 Grams or More of a Mixture or Substance Containing a Detectable Amount of Methamphetamine, Use of a Communication Facility to Facilitate a Title 21 Drug Felony Offense, and Criminal Forfeiture. Defendant seeks to have the Indictment dismissed, or in the alternative, suppress the evidence that was found in a black Ford Focus, which was "administratively seized" by DEA agents and subsequently searched pursuant to a search warrant.

This case involves the search and seizure of a car and its occupants without a

warrant. Defendant contends that the manner of the execution of the search and seizure was unreasonable in the constitutional sense.

The Fourth Amendment to the Constitution protects people from "unreasonable" searches and seizures by the Government. U.S. Const. amend IV. Ordinarily, the Fourth Amendment requires that a warrant be issued by a court before a search or seizure can be made. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The courts and Congress enacted Rule 41 of the Federal Rules of Criminal Procedure to govern the issuance of warrants by the courts and the execution of warrants by law enforcement. Generally, searches and seizures that are executed in conformance with Rule 41 are considered reasonable. *United States v. Martinez-Garcia*, 397 F.3d 1205 (9th Cir. 2005)

The courts have, by decision, carved out exceptions to the Constitution's warrant requirement. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 583 n. 11 (1988) *rev'd on other grounds*, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (listing well-defined exceptions to the search warrant requirement). Usually these exceptions have involved situations where law enforcement is faced with exigent circumstances that make seeking a warrant impracticable. One of the recognized exceptions is the search of a car. *Carroll v. United States*, 267 U.S. 132 (1925). Rule 41 by its terms does not apply to searches of a car. No court, however, has said that the judicially created freedom from the warrant requirement permits the Government to conduct a warrantless search or seizure in an unreasonable manner. The Court concludes that the test for judging the execution of the warrantless search and seizure is its reasonableness. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). The term "unreasonable" is not defined in the Constitution. *South Dakota v. Opperman*, 428 U.S. 364, 381 (1976). In the absence of a criminal rule governing the execution of warrantless searches and seizures, the Court must determine the contours of reasonableness. The facts of the case found by the Court below are judged by this standard.

BACKGROUND FACTS

On December 18, 2004, at approximately 6:00 p.m., Defendant and his passenger, Diana Maria Volerio-Perez, were traveling in a black Ford Focus, heading north on Highway 97 near La Pine, Oregon. As they pulled up to the intersection of U.S. Highway 97 and Veteran's Way in Redmond, Oregon, a disabled car was stopped at the intersection. Defendant stopped his car behind the disabled car. While they were waiting, a truck with Minnesota license plates ran into the back of their car. Defendant got out of the car to see if there was any damage. Within minutes, a marked patrol car arrived at the scene, driven by Deschutes County Sheriff's Department Deputy Robert Short. Sergeant Short told Defendant that he suspected the driver of the truck to be drunk and that Defendant needed to drive his car to a parking lot adjacent to a nearby restaurant. Once at the parking lot, another officer, Jeff Pullig, ordered Defendant and Ms. Volerio-Perez out of the car, but did not permit Defendant to turn off the car, or take the keys. Defendant was required to show his driver's license, proof of insurance, and the registration to the deputy. Ms. Volerio-Perez also had to show her driver's licence. After she provided her driver's license, she attempted to get back into the car because she had left her purse in the car. She was told by Sergeant Short that she was not allowed to get back into the car.

Defendant and Ms. Volerio-Perez were then directed to get into the marked patrol car. Prior to getting into the patrol car, they were both searched. Ms. Volerio-Perez was asked to pull her sweater to her chin while the police patted her down. While Defendant and Ms. Volerio-Perez were in the back seat of the Deschutes County Sheriff patrol car, Officer Pullig came to the side of the patrol car and asked if anyone was in the car with them. They replied no one. At that point, Officer Pullig opened the car door so they could get out and see that someone was driving the black Ford Focus away from the scene at a high rate of speed. Officer Pullig ordered Defendant and Ms. Volerio-Perez out from the patrol

car, jumped into the car, turned on the overhead flashing lights and siren, and proceeded to chase the black Ford Focus north on Highway 97.

Minutes passed. Defendant and Ms. Volerio-Perez were told that this was the third similar auto theft in Deschutes County in the last month. While they were standing in the parking lot, the black Ford Focus sped by going south on Highway 97 with the patrol car in pursuit. After approximately 20-25 minutes, Officer Pullig returned to the parking lot and told Defendant and Ms. Volerio-Perez that he could not catch the person who stole their car. Officer Pullig also handed Ms. Volerio-Perez her purse and Defendant a cell phone that was in the black Ford Focus. He explained that the person who stole their car threw these items out the window. Emotionally upset about the turmoil and events, Ms. Volerio-Perez became sick to her stomach and had to use the restaurant's restroom. Eventually, Sergeant Short gave Defendant and Ms. Volerio-Perez a ride to a nearby motel, where they spent the night and had friends come and pick them up the next day.

The someone who "hit" Defendant's car from behind was Drug Enforcement Administration (DEA) Special Agent Tom Sullivan. The someone who "stole" the black Ford Focus was DEA Special Agent Sean Cummings. Officer Pullig was really DEA Special Agent Jeff Pullig. The staged accident and the theft of the car were all part of the administrative seizure of the black Ford Focus, which the DEA agents believed they had statutory authority to seize because the black Ford Focus had been used months earlier to facilitate the transportation of controlled substances, and because the DEA agents believed the black Ford Focus was, at the time of the seizure, being used to transport methamphetamine and cocaine. On the evening of December 18, 2004, prior to executing the plan, Sergeant Short spoke with Stephen Gunnels, a Deschutes County prosecutor who is also cross-deputized as a Special Assistant United States Attorney (SAUSA). Sergeant Short wanted to obtain Mr. Gunnels' legal opinion regarding the stop. Mr. Gunnels was not asked to authorize the plan; rather, he was asked if it was lawful to seize the drugs under

these circumstances. Mr. Gunnels concluded they had legal authority to seize the vehicle.

The backdrop of the "administrative seizure" unfolded in the Fall of 2004, when DEA agents began to piece together evidence that a drug distribution ring was operating in the Eastern Washington area, which was collectively referred to as the "Robert Lopez organization." As part of the investigation, in September and November, 2004, DEA agents conducted two controlled buys of drugs. In each instance, the black Ford Focus was used to either transport the drugs, or the transaction was conducted inside the vehicle. Neither the Defendant nor his passenger were involved in these transactions.

As part of the investigation into the Robert Lopez organization, DEA agents obtained wiretap authorization in November, 2004. As a result of the wiretap, DEA agents intercepted a series of conversations that indicated that someone in a black Ford Focus would be transporting methamphetamine and cocaine from Los Angeles, California, to the Eastern Washington area. DEA agents were able to surveille a black Ford Focus traveling from Kennewick, Washington, to Los Angeles, California. Based on information gained from the intercepted conversations, DEA agents were able to ascertain with precision the black Ford Focus' departure from Los Angeles, California, and the subsequent rendevous point of the black Ford Focus near La Pine, Oregon.

As the car traveled toward La Pine, Oregon, DEA agents decided that they should administratively seize the Ford Focus, but wanted to do so without letting the driver of the black Ford Focus know they were seizing the car. They believed that the black Ford Focus was subject to administrative forfeiture as a result of the controlled buys in September and November and because they had probable cause to believe that the car was transporting controlled substances. To accomplish this, the agents brain-stormed and came up with two plans. The first plan would be to car-jack the car while Defendant was stopped at a gas station. The second plan

would be to have an unmarked car stall at an intersection. As the Ford Focus approached the intersection behind the stalled car, another DEA agent, posing as a drunk driver, would run into the Ford Focus from behind. Once the driver and passenger of the Ford Focus were separated from their vehicle, a DEA agent would jump into the car and drive away. For some reason, the second plan sounded better, and the DEA agents elicited the help of the Deschutes County Sheriff's Office to execute the plan.

As set forth above, the ruse unfolded according to plan. After DEA agent Sean Cummings "administratively seized" the car, he drove it to the Deschutes County Sheriff's Office impound lot where it was stored for the night. The next day, Agent Cummings drove the black Ford Focus to Spokane, where DEA agents obtained a search warrant based on the intercepted telephone calls. The affidavit in support of the search warrant was silent regarding the controlled buys or the manner in which the black Ford Focus was "administratively seized." Approximately two (2) kilograms of suspected cocaine and approximately three (3) pounds of methamphetamine were located in a compartment in the black Ford Focus.

DISCUSSION

Defendant seeks to have the Indictment dismissed, or, in the alternative, have the evidence suppressed on a number of grounds. First, Defendant argues that the Indictment should be dismissed because the police actions were outrageous. Second, Defendant argues that the execution of the search and seizure was unreasonable and the evidence obtained should be suppressed. Defendant also argues that the execution of the search warrant was in violation of Federal Rules of Criminal Procedure 41 and the evidence seized should be suppressed. Finally, Defendant asserts that the vehicle stop resulted in the illegal seizure of Defendant.

The Government argues that the black Ford Focus was used to facilitate the distribution and transportation of cocaine and methamphetamine and was subject to

administrative forfeiture. Moreover, while the methods of administratively seizing the black Ford Focus were unusual, creative, and out-of-the ordinary, the seizure of the vehicle was supported by law and executed in a reasonable manner.

In analyzing whether the statute provides authority to administratively seize the black Ford Focus, it is important to remember that there are three distinct events that could support the seizure and subsequent search of the vehicle: (1) the controlled buys of September and November, 2004; (2) the information known as of the morning of December 18, 2004; and (3) the issuance of the search warrant. Each of these events must be reviewed as separate events in determining whether the agents' actions were reasonable.

A. Forfeiture Statute

Section 881(a)(4) of Title 21 of the United States Code provides that an automobile which is used to facilitate a narcotics transaction is subject to forfeiture to the United States.[1] Section 881(b), in turn, provides that "[a]ny property subject to forfeiture to the United States . . . may be seized . . . in the manner set forth in section 981(b) of Title 18." 21 U.S.C. § 881(b). Section 981(b)(2) of Title 18 provides that authorized seizures must be made pursuant to a warrant obtained in

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[1]Section 881(a) provides in pertinent part as follows:

(a) Subject Property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter . . .

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1).

21 U.S.C. § 881(a).

the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a warrantless seizure may be made if there is probable cause to believe that the property is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search or another exception to the Fourth Amendment warrant requirement would apply. 18 U.S.C. § 981(b)(2). Thus, the statutes contemplate two discrete events: the forfeiture of the property and the seizure of the property.

(1) Forfeiture

A forfeiture occurs at the time of the unlawful act. 21 U.S.C. § 881(h)[2]; *United States v. Walker*, 900 F.2d 1201, 1204 (8th Cir. 1990). Here, the black Ford Focus was subject to forfeiture based on the controlled purchase that took place in September, 2004. Pursuant to section 881(h), the black Ford Focus was forfeited to the Government when the controlled buy took place and all rights, title, and interest in the car vested in the Government in September, 2004. Even if the controlled buys had not taken place, the black Ford Focus would be subject to forfeiture on December 18, 2004, because the vehicle was transporting controlled substances.

(2) Seizure

Section 881(b)(2) requires that a warrant be obtained prior to seizing the forfeited property, unless one of the exceptions to the warrant requirement provided in the statute applies. The Government argues that the warrantless seizure of the black Ford Focus was permitted under the statute because there was probable cause to believe the car was subject to forfeiture, and the automobile exception to the Fourth Amendment applied. The Court agrees.

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[2]Section 881(h) provides:

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section. 21 U.S.C. § 881(h).

(a) Probable Cause

Whether probable cause exists to justify a warrantless seizure of an automobile turns on whether, at the moment of the seizure, "the facts and circumstances within the agent's knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." *United States v. Kimak*, 624 F.2d 903, 905 n.3 (9th Cir. 1980). A vehicle may be seized for forfeiture even in the absence of probable cause to believe it contains contraband if there is probable cause to believe that it was used "to facilitate the transfer of contraband." *United States v. Johnson*, 572 F.2d 227, 234 (9th Cir. 1978).

The agents had probable cause to believe the car was subject to forfeiture, based on the controlled buys and the intercepted phone calls that indicated the black Ford Focus would be transporting controlled substances from California to Washington. If the agents had sought a warrant to administratively seize the vehicle in a manner contemplated by the statute, a magistrate would have authorized a warrant.

(b) Automobile Exception

The statute permits the warrantless seizure of the black Ford Focus if one of the exceptions to the Fourth Amendment warrant requirement applies. The automobile exception to the Fourth Amendment provides that "if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more. *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam) (*quoting Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam)). The practical reality of the interplay between 18 U.S.C. § 981(b)(2) and the recognized automobile exception is that anytime federal agents have probable cause to believe that an automobile was used, or is being used, to facilitate the transportation or sale of controlled substances, they can seize

the vehicle without first obtaining a warrant.[3] The Court agrees with the Government, then, that the agents were authorized to seize the vehicle without a warrant.

(3) Execution of the Seizure

In passing the Civil Asset Forfeiture Reform Act of 2001, Congress intended to provide a more just and uniform procedure by creating general rules designed to increase the due process safeguards for property owners whose property has been seized. H.R. Rep. No. 106-192 (1999). Even so, section 981is silent with regard to how agents should execute a warrantless seizure of forfeited property. Section 981(b)(2) only provides that seizures must be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. It does not state the execution of the warrant or the seizure must conform to the Rules.

The Court is troubled by the unreasonable manner of execution and the lack of due process that was afforded Defendant when the agents "seized" the black Ford Focus that he was driving. First, the agents had statutory authority to seize the car in September, 2004, yet they waited to execute the search until some months later when persons who were not connected with the prior controlled purchases were using the forfeited vehicle. Second, even if the agents had statutory authority to seize the vehicle on December 18, 2004, the fact that they failed to notify Defendant that his car was being seized is problematic. Finally, no Court passed on the extended delay in notification. Even so, the Court cannot say that the agents violated any one provision of the civil forfeiture statutes applicable to this case as the statute is silent about notice and the timeliness of a warrantless

[3]This interpretation of the statute is consistent with Fourth Amendment jurisprudence. In *Florida v. White*, 526 U.S. 559 (1999), the Supreme Court held that a warrantless seizure of an automobile, pursuant to a state forfeiture statute, does not violate the Fourth Amendment. *Id.* at 565-66.

seizure. This does not end the Court's inquiry, however, because the "administrative seizure" must be reasonable in the Constitutional sense.

C. Fourth Amendment

Searches for administrative purposes are governed by the Fourth Amendment. *Michigan v. Tyler*, 436 U.S. 499, 501 (1978); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (holding that drug and alcohol testing of railroad employees is governed by the Fourth Amendment); *New York v. Burger*, 482 U.S. 691, 693 (1987) (finding that the Fourth Amendment governs a warrantless search of an automobile junkyard); *New Jersey v. T.L.O.*, 469 U.S. 325, 333-36 (1985) (holding that the Fourth Amendment applies to searches conducted by public school officials). The Fourth Amendment protects individuals from "unreasonable" searches of their persons, homes, and possessions. U.S. Const. amend. IV. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 358 (1967).

A seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). "The Fourth Amendment says nothing specific about formalities in exercising a warrant's authorization, speaking to the manner of searching as well as to the legitimacy of searching at all simply in terms of the right to be 'secure. . . against unreasonable searches and seizures.'" *United State v. Banks*, 540 U.S. 31, 35 (2003).

Generally, the execution of a search warrant is "left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant–subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Dalia v. United States*, 441 U.S. 238, 257 (1979); *see also Banks*, 540 U.S. at 35-36 ("Although the notion of reasonable execution must therefore be fleshed out, we

have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.").

Even where an exception to the warrant requirement applies, the Government must execute searches and seizures in a reasonable manner. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government–whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement–is not that they always be correct, but that they always be reasonable."). The permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *Skinner*, 489 U.S. at 619.

In analyzing the reasonableness of the manner in which the execution of the warrantless seizure was executed, it is important to remember that the agents could not have executed the seizure in a manner that would not have met prior approval of a magistrate. *United States v Johns*, 469 U.S. 478, 483 (1985) ("[T]he exception to the warrant requirement recognized by *Carroll* allows a search of the same scope as could be authorized by a magistrate."). Here, DEA agents executed the warrantless seizure of the black Ford Focus, using a number of questionable tactics: the use of a ruse; the use of force; failing to notify the driver of the vehicle that they were administratively seizing the vehicle; and committing criminal acts. The lens through which the Court views the agents' action asks whether a

magistrate would have authorized the execution of the warrantless seizure in the manner in which it was executed and whether the seizure was reasonable.

(1) Hiding the fact of the search and seizure (Covert search and seizure)

In this case, the agents executed a warrentless covert search and seizure. Although the Court was not able to uncover any authority that directly addresses the constitutionality of warrentless covert searches and seizures, it was able to gleam from other case law, statutes, and the Federal Rules of Criminal Procedure guidance as to whether the execution of the warrantless search and seizure was reasonable under the Fourth Amendment.

A search and seizure by law enforcement is almost always identifiable as such. Agents wear jackets that prominently display "Police" or some other law enforcement agency. Warrants are immediately produced to justify the action. *United States v. Gantt*, 194 F.3d 987, 1001 (9th Cir. 1999). Cars are normally stopped by uniformed police officers. Searches after stops appear to be what they are. Consequently, the legitimacy of the actions by law enforcement can be judged by the persons involved and those passing by. The public and the individual involved know that they must cooperate and not interfere. Moreover, the public can access the records of the court and review the justification for the search and the items seized.

The court guards the process by requiring that the warrant be left with the place and person involved and that an inventory be prepared and filed with the court. *See* Fed. R. Crim. P. 41(f). The hour of the search can be determined and limited by the Court to daytime hours. *See* Fed. R. Crim. P. 41(e)(2)(B). The court requires the search be conducted in a specified period of time to insure that the justification for the search does not become stale. *See* Fed. R. Crim. P. 41(e)(2)(A).

In *United States v. Johns*, 948 F.2d 599 (9th Cir. 1991), the court reviewed the issuance of a warrant that authorized the agents to delay giving notice after the

search. Like here, the notice of the execution of the warrant was delayed until the defendants were arrested. *Id.* at 603. The Ninth Circuit found that a magistrate could not authorize such a delay under Rule 41 and that suppression would normally be required. *Id.* at 604. Ultimately, the evidence was not suppressed because of the good faith exception. *Id.* at 605. The circuit relied on Rule 41 alone and avoided ruling on whether notice was required by the Constitution. *Id.* at 604 n.2. While Rule 41 may not apply to warrantless searches, the court's exclusion of evidence for its violation is instructive on the determination of reasonableness in the context of other searches.

Another indication that a covert search without judicial authorization may be unreasonable is found in The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act, Pub.L. No. 107-56, passed by Congress in 2001. Therein, Congress addressed the professed need of the Executive branch to delay providing notice of searches. *See* Pub. L. No. 107-56 § 213, *codified at* 18 U.S.C. § 3103a(b). In doing so, Congress authorized the courts to approve such delays in notice in very prescribed circumstances. *Id.* First, the court must find reasonable cause to delay notification. § 3103a(b)(1). Second, the warrant must prohibit the taking of tangible property unless the court finds reasonable necessity for the seizure. § 3103a(b)(2). Third, the warrant must provide for notice within a reasonable period of time which can only be extended by the court. § 3103a(b)(3). While the constitutionality of this statute has not been determined, it certainly suggests that a covert search is something that requires judicial oversight and is not something that is left to the Executive branch alone to determine.

Finally, Supreme Court precedent suggests that a warrant is needed in order to authorize a covert execution of a search or seizure. *Dalia*, 441 U.S. at 247 ("Implicit in the decision such as *Silverman* and *Irvine* has been the Court's view that covert entries are constitutional in some circumstances, at least if they are

made pursuant to a warrant.").

The seizure in this case needs to be contrasted against the principles discussed above. Unlike a normal seizure by law enforcement, this seizure appeared to be a car theft. Any person seeking information on the theft would reach a dead end. Local authorities were told to deny knowledge of the event if asked. Even during the pendency of the case before this Court, defense attorneys were told that there was no record of such an event in the Deschutes County Sheriff's Office records. No inventory was filed. No judicial determination was made of the need for a covert search. No judicial determination was made of the period of time needed to delay notification. No judicial review of the inventory was made. All of the decisions normally made by the judiciary were made by the officers involved. It is difficult to conclude that the authors of the Fourth Amendment contemplated such discretion be afforded to the Executive branch. *United States v. United States District Court for Eastern Dist. of Mich.*, 407 U.S. 297, 316-17 (1972) (The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. . . [T]hose charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, in that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.").

The very basis of the Fourth Amendment was a distrust of the Executive branch and overreaching searches. *United States v. Berdugo-Urquidez*, 494 U.S. 259 (1990) ("The driving force behind the adoption of the [Fourth] Amendment, as suggested by Madison's advocacy, was widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used

to convict persons of libel."). The judiciary was to be the one to determine the need and contour of searches and seizures before the fact. *United States District Court*, 407 U.S. at 318. ("Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights."). While the automobile exception to the warrant requirement has been created by the courts for practical reasons, it does not contemplate that the rest of the procedures that go into a reasonable search will be left to the discretion of the Executive branch as well.

Although not necessarily Constitutionally required, other factors bear into the reasonableness of the search. The automobile exception to the warrant requirement began as a response to exigency. In this case, there was no exigency. The authorities had probable cause to seize the vehicle months before the seizure. They chose to wait to execute the seizure of the vehicle. There was ample time to seek approval for a covert search and seizure under the Patriot Act. Probable cause to search and seize for the transportation of drugs from California to Eastern Washington had been established the day before the search and there was ample time to get a warrant for a covert search. The failure to seek judicial approval of this unusual conduct is relevant to the Court's determination of reasonableness.

(2) The Use of Force

Normally, a judicially-approved search does not contemplate the use of force not associated with the search itself. In this incidence, the Defendant's car was hit from behind. This striking was not part of the search but was a ploy to hide the search. A seizure becomes unlawful when it is "more intrusive than necessary." *Ganwich v. Knapp*, 319 F.3d 1115, 1122 (9th Cir. 2003). To determine whether the execution of the administrative seizure in this manner was justified, the Court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005). In assessing the reasonableness of the agents'

conduct under the Fourth Amendment, an appropriate factor to consider is whether the officers considered alternatives before undertaking intrusive activity implicating constitutional concerns. *Id.* at 977.

Here, a DEA agent intentionally hit Defendant's car from behind. The agents testified that they merely tapped the car. Even if this were true, enough force was used so that the tap was felt by Defendant to the extent that it caused him to get out of his car and examine his bumper to see if any damage had occurred. Also, as a result of the staged "theft," Defendant and Ms. Volerio-Perez became victims of a crime and were subject to the emotional toil that accompanies being a victim of a crime. The fact that no one received any reported injuries does not justify the intentional infliction of emotional distress caused by being hit by a vehicle and having a car stolen before your very eyes. In their response, the Government emphasizes that at all times Defendant and Ms. Volerio-Perez were treated as "victims," rather than defendants, implying that the former is more preferable to the later. The Court cannot agree. Being a victim of any crime places one in an extremely vulnerable position, without any constitutional protections. The same cannot be said if Defendant had been arrested, or if the car had been administratively seized with proper notification and without inflicting emotional distress on the Defendant and Ms. Volerio-Perez. The fact that the agents used force to effectuate the administrative seizure is relevant to this Court's determination of reasonableness.

(3) The search and seizure of Defendant

The intentional stopping, searching, and detention of people is a crime if committed by private citizens. It is permissible conduct by law enforcement if done in connection with legitimate activities, such as an arrest. In this case, as part of the administrative seizure, people were stopped, searched, and detained. This is not usual in an administrative search. The Defendant and his passenger were ordered to move the car to a parking lot, to get out of the car, to not get back in the

car to retrieve a purse, to leave the keys in the car, and to get in the police vehicle. In such circumstances neither would feel free to leave. While the same conduct is legitimate if the stop is to arrest or search for evidence, it loses its legitimacy when it is done on a pretext. It was not reasonable to delay the administrative search of a car until people were in the car. Such a procedure avoids the Constitutional protections of persons and their personal privacy. Such an invasion of the occupants should not be condoned without judicial review before the event. The search and seizure of Defendant and Ms. Volerio-Perez is relevant to the Court's determination of reasonableness.

(4) The Seizure of Private Property Unrelated to the Administrative Seizure of the Vehicle

When the agents "administratively seized" the black Ford Focus, the agents confiscated property from Defendant and Ms. Volerio-Perez that clearly was not forfeited to the Government. There were a number of CDs in the car as well as personal items one would have when taking a trip, including clothing and a backpack. In addition, a camera, a check book with blank checks and a check register were also in the car. Clearly, these items were not subject to forfeiture or seizure. The Government had no statutory right to seize these items. The reality is that by executing the seizure in this manner, the agents stole personal property of Defendant and Ms. Volerio-Perez that they had no right to take.

The fact that the agents stole property of Defendant and Ms. Volerio-Perez when executing the administrative seizure is relevant to a determination of reasonableness.

(5) The Reasonableness of the Search and Seizure

In determining the constitutionality of the search and seizure that took place in La Pine, Oregon, the Court engages a two-fold analysis. First, the Court looks at the totality of the circumstances in an effort to determine whether the search and seizure was reasonable. As part of this inquiry, the Court asks whether a magistrate would have authorized, before the fact, the manner in which the seizure

was executed. The constitutionality of covert searches and seizures with or without a warrant has not been determined. As noted earlier, courts have used Rule 41 of the Federal Rules of Criminal Procedure rather than the Constitution in reviewing such searches. Even so, the Court is convinced that a covert search and seizure must, at a minimum, be approved in advance by the judiciary by way of the issuance of a warrant.

In looking at the totality of the circumstances, it is helpful to analyze the seizure into the three discrete actions by DEA agents that were discussed above: (i) the controlled buys in September and November, 2004; (ii) the information known as of the morning of December 18, 2004; and (iii) the issuance of the search warrant.

(i) Controlled Buy in September, 2004

If the controlled buys provided the statutory authority for the administrative seizure, the Court concludes that the manner in which it was executed was not reasonable. The controlled buy that resulted in the administrative forfeiture occurred in September, 2004. At the time of executing the seizure, the agents knew that the persons in the car were not the persons who engaged in the controlled purchase. There were no exigent circumstances based on the controlled buy, except those created by the DEA agents by waiting until the car was en route, before deciding to execute the warrant.

Based on the September 14, 2004, controlled buy of drugs, the agents could have sought a warrant to search and seize the vehicle authorizing delayed notice under 18 U.S.C. 3101a(b). Had they done so, a magistrate would find that the manner in which the DEA agents wanted to seize the vehicle unauthorized and unreasonable. A magistrate would have been notified that the persons presently driving the car were not the individuals involved in the previous controlled buys. A magistrate would have been told that the event was to be disguised as a theft. In that instance, seizing the car at that point in time, and in that manner, would be

akin to stealing a rental car that was used previously in a controlled purchase, but was being driven by an unrelated third-party. A magistrate would not have found that the USA Patriot Act provisions were met and would not have approved a covert seizure.

(ii) December 18, 2004

By the morning of December 18, 2004, DEA agents had probable cause to believe that the black Ford Focus was transporting controlled substances. At that time, they had probable cause to stop, detain, and arrest Defendant, and administratively seize the vehicle. This did not happen. Instead, the totality of the circumstances—the use of force to stop the vehicle, the phony high speed chase, the search of the individuals under false pretenses, the seizure of unrelated property, the obliteration of any record of the event, and the other events involved in the incident—created an unreasonable search and seizure.

If, on the morning of December 18, 2004, DEA agents had submitted an application for a 18 U.S.C. § 3103a(b) warrant application to search and seize the vehicle based on intercepted conversations, a magistrate may have found that delaying notice of the seizure was justified. The DEA agents may have shown to a magistrate's satisfaction that the on-going investigation would be jeopardized if notice was given. Even so, a magistrate would not have approved the execution of the warrant in the manner in which it was done. The above-listed tactics were unreasonable and were not authorized by the USA Patriot Act—only the delay in providing notice was authorized by the USA Patriot Act. The remainder of the activities were not authorized by statute or case law. A reviewing court would have found the manner of execution of the warrant to be unreasonable.

(iii) The Spokane Search Based on the Warrant

After driving the car to Spokane, DEA agents obtained a search warrant from the magistrate. The Court has already concluded that the agents acted unlawfully in seizing the car in the manner described. The question then becomes,

can the agents remove the taint of their unlawful actions by seeking a warrant that does not disclose the unlawful conduct. The Affidavit in Support of the Search Warrant was silent regarding the previous controlled buys that took place in the black Ford Focus. It was silent about the manner in which the vehicle was "seized." If the DEA agents had included the details of how the search was executed, a magistrate would not have approved the search warrant. It would have been clear to a magistrate that the execution of the seizure was done in an unreasonable manner, and a magistrate would refuse to give judicial approval of such conduct.

Of course, the agents did not need to obtain a search warrant from the magistrate before they searched the black Ford Focus. *United States v. Johnson*, 572 F.2d 227, 232 (9th Cir. 1978). Indeed, in its briefing, the Government stresses the fact that it was not necessary for the DEA agents to obtain the warrant, and argues that the obtaining of the warrant adds support for the subsequent search of the vehicle. The Government's argument misses the point. Instead, the crucial issue is *why* the agents sought a search warrant after administratively seizing the car. The logical conclusion is that they must have had serious reservations regarding the manner in which they "administratively seized" the car and sought the magistrate's stamp of approval of the process in order to legitimize the subsequent search.

The question the Court must answer, then, is whether the obtaining of the search warrant in any way washes away the taint of the illegal seizure. The Government would have had more support for its arguments if the DEA agents were forthright with the magistrate regarding the manner in which the Ford Focus was administratively seized. Again, the failure to inform the magistrate regarding the seizure leads to the logical conclusion that the agents did not want the magistrate to know how the Ford Focus was seized. The Court is convinced that had the magistrate been informed of the manner in which the vehicle was seized,

the magistrate would not have issued the search warrant, because the seizure of the Ford Focus was executed in an unreasonable manner. Moreover, had a warrant been issued to search the car by a magistrate who had full knowledge of the manner in which the car was seized, the Court concludes that the evidence still could not be used in a subsequent prosecution because of the prior unreasonable seizure.

Because the administrative seizure of the Ford Focus was unreasonable and violated the Fourth Amendment, any search adjunct to the seizure would also be unreasonable. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The obtaining of the search warrant does not wash away the unreasonableness of the illegal seizure.

D. Exclusionary Rule

As discussed above, if the Ford Focus was validly seized for forfeiture, the agents could have conducted a warrantless search of the vehicle as incident to the administrative seizure and no search warrant would be necessary. *Johnson*, 572 F.2d at 232. This only begs the question, however, as to whether agents can conduct a warrantless search or a search authorized by a warrant, if the vehicle was *not* validly seized for forfeiture.

Generally, under the exclusionary rule, evidence obtained in violation of the Fourth Amendment may not be used in criminal proceedings against the victim of the illegal search and seizure. *Illinois v. Krull*, 480 U.S. 340 (1987). The "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Id.* (Citations omitted). Evidence seized both directly or indirectly in violation of the Constitution must be excluded. *Wong Sun*, 371 U.S. at 484 (holding that statements obtained that are the result of unlawful entry is the "fruit" of official illegality and subject to exclusion).

The Ninth Circuit has set forth three factors the Court should consider in

determining whether the exclusionary rule should apply in a particular case: (1) whether suppression would affect the group conduct that the exclusionary rule was designed to punish, *i.e.*, police misconduct; (2) the source of the error in the particular case and whether any evidence suggested that the source, *e.g.*, issuing magistrates, was inclined to ignore or subvert the Fourth Amendment; and (3) the basis for believing the exclusion of evidence will have a significant deterrent effect upon the source of the error. *United States v. Sears*, 411 F.3d 1124, 1129 (9th Cir. 2005). Suppression is not appropriate if "the incremental deterrent value would be minimal." *Id.* (quoting *New York v. Harris*, 495 U.S. 14, 20 (1990)).

Applying these factors to the facts in this case, the Court concludes that suppression of the evidence obtained as a result of the unlawful search and seizure is the proper remedy. Suppression of the evidence will directly affect DEA, which is the group that is responsible for the misconduct. The source of the error was the DEA agents themselves, and was not the magistrate. Finally, the need to deter future unlawful police conduct is strong. Covert warrantless seizures of administratively forfeited property are potentially dangerous and problematic. Without some process, the danger of the overreaching feared by the drafters of the Fourth Amendment is real as is demonstrated here. This need "outweighs the costs of withholding reliable information from the truth-seeking process." *Krull*, 480 U.S. at 348-49. The Court is convinced that suppression in this instance will have a significant deterrent effect upon the DEA agents and the manner in which they administratively seize property.

The fact that Sergeant Short contacted Mr. Gunnels and discussed some of the details of the anticipated seizure does not trigger the good faith exception to the exclusionary rule. In *United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988), the Ninth Circuit rejected the Government's argument that the fruits of a warrentless search should be admissible evidence because the police conducted the search in good faith. *Id*. at 1579. Moreover, Gunnels was not asked to authorize the plan.

Suppression of the evidence obtained as a result of the covert warrentless seizure of the black Ford Focus meets the purpose of the exclusionary rule and is appropriate in this case.

E. Outrageous Conduct

A district court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation. *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991). If the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss an indictment under its supervisory powers. *Id.* These powers may be exercised for three reasons: to remedy a constitutional or statutory violation; to protect judicial integrity by insuring that a conviction rests on appropriate considerations validly before a jury; or to deter future illegal conduct. *Id.* Dismissal is appropriate when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial action is available. *Id.* For example, a Fourth Amendment violation may properly result in dismissal if the violation is not adequately remedied by application of the exclusionary rule. *Id.*

To violate due process, governmental conduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice." *Barrera-Moreno*, 951 F.2d at 1092. In this case, law enforcement intentionally caused an accident and stole a car, along with Defendant's and Ms. Volerio-Perez's personal effects – all to effectuate an administrative seizure that could have been done with flashing lights and sirens. In reading the facts of this case, one cannot help but be shocked and outraged by the manner in which the DEA agents chose to effectuate an administrative seizure.

The brain teaser in all of this is that the agents could have done much that they did under the color of federal law. Clearly, they could have pulled Defendant over, arrested him, searched the car incident to arrest, and administratively seized the car at the same time. No constitutional violations would have occurred if the

agents would have provided some process for doing all those things. Because the agents chose to act outside the proscriptions of the law, however, their conduct is shocking and outrageous to the point that it violates the universal sense of justice.

Here, the exclusionary rule will adequately remedy the constitutional violations. Thus, dismissal under the supervisory power is not appropriate. Nor is dismissal of the Indictment proper for the due process violations. The Indictment is not based on just the facts surrounding the seizure of the Ford Focus. The illegal search and seizure did not taint the remaining legitimate Government conduct in securing the Indictment. *United States v. Montoya*, 45 F.3d 1286, 1300 (9th Cir. 2005) ("Outrageous government conduct is not a defense, but rather a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed.")

F. Illegal Seizure

Defendant argues that he was illegally seized as a result of the DEA actions as described above. The Court agrees. However, no further relief is requested because of this seizure other than the suppression of the evidence in the car which the Court has already addressed. No further remedy is necessary.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Dismiss or Suppress (Ct. Rec. 616) is **GRANTED**, in part.

2. Defendant's Motion for Evidentiary Hearing (Ct. Rec. 648) is **GRANTED**.

3. Defendant's Motion to Dismiss (Ct. Rec. 698) is **DENIED**.

4. Defendant's Motion to Suppress Evidence (Ct. Rec. 699) is **GRANTED**.

5. Defendant's *Ex parte* Motion to Seal the Exhibits Attached to the Motion for Dismisal [sic] or Suppression (Ct. Rec. 639) is **GRANTED**.

6. Defendant's Motion for Interpreter Services (Ct. Rec. 694) is

DENIED, as moot.

7. On March 23, 2006, the Court struck the trial date (Ct. Rec. 738). A new trial date is **set** for **May 30, 2006**, at **9:00 a.m.**, in Spokane, Washington. Counsel shall meet in chambers at **8:30 a.m.**, on the first day of trial.

8. A pretrial hearing is set for **May 15, 2006**, at **10:00 a.m.**, in Spokane, Washington.

9. Pursuant to 18 U.S.C. § 3161(h)(1)(F), the time between January 26, 2006, the date the motion to suppress was filed, until the date this order is entered, is **DECLARED EXCLUDABLE** for purposes of computing time under the Speedy Trial Act.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED the 20th day of April, 2006.

s/ Robert H. Whaley

ROBERT H. WHALEY
Chief United States District Judge

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